Mohamad Nazarie bin Halidi v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — APPEAL NOS Q-05(M)-210–05 OF 2017 AND Q-05(M)-211–05 OF 2017
HAMID SULTAN, ABANG ISKANDAR AND BADARIAH SAHAMID JJCA
26 MARCH 2019

Criminal Law — Appeal — Appeal against conviction and sentence — Both accused charged under s 302 read together with s 34 of the Penal Code — Both accused convicted and sentenced to death by trial judge — Whether failure to prove motive fatal to prosecution's case — Whether DNA evidence placed accused at scene of crime — Whether identification necessary when DNA evidence already placed accused at crime scene — Whether common intention proven — Penal Code ss 34 & 302

Evidence — Adverse inference — Suppression of evidence — Witness was offered to the defence — Whether there was suppression of material evidence — Evidence Act 1950 s 114(g)

This was an appeal from the decision of the learned High Court judge who had convicted the two appellants for murder. The two appellants were charged under s 302 read together with s 34 of the Penal Code ('the Code') for the murder of the deceased. The trial judge found that the first appellant was armed with a stick and the second appellant was armed with a knife who had broken into the backdoor and entered the house approaching towards PW1. PW1 was able to identify both the appellants during an identification parade and in court. Both their DNA's and that of the deceased was found on the stick and sickle which pointed to the fact that the said exhibits were used by the two appellants to attack the deceased in the house on that night. Based on the multiple injuries sustained by the deceased, the trial judge found that there was an intention to cause death to the deceased. The two appellants in their defence had put the blame onto Dedeng saying that: (a) Dedeng was sniffing glue; (b) Dedeng tried to enter the house; (c) the accused persons were sleeping when Dedeng woke them up; and (d) the key of the Toyota Prado was with Dedeng. In the appeal the defence counsel for the first appellant raised in the petition of appeal the following issues: (i) failure to call Justira, Nizam and Noraini as witnesses; (ii) no weapons purportedly used by the assailants were identified by any of the prosecution witnesses; (iii) the trace of blood found on the trousers allegedly worn by the first accused; (iv) motive of murder; (v) the improper identification parade; (vi) DNA; (vii) plastic bag; and (viii) common intention.

The second appellant raised the fact that there was no prima facie case at the end of the prosecution's case on the following grounds: (1) many questions raised by the trial judge were not dealt with during the prosecution case such as: (A) who took the Toyoto Prado's key, Justira, first appellant or second appellant? (B) was Justira in or at the house at the material time when the allegend offence was committed? (C) were Nizam and Noraini together with the first and second accused working and staying at the worker's quarters; and (D) did Justira, Nizam and/or Noraini know what happened in the house at the time? (2) failure to call Justira as witness during prosecution case; (3) the learned trial judge erred in fact and in law when he ruled that Justira's involvement in the murder was not put to the prosecution witness except the investigating officer; and (4) no blood sample or DNA were taken from Justira.

Held, dismissing the appeals:

(1) The matching of the DNA profiles of the two appellants with the crucial exhibits seized in relation to the investigation into the case had literally put the two accused persons in their respective place. The irresistible conclusion was that the two accused persons must be at the crime scene at the time as alleged by PW1. The evidence of PW1 had been corroborated in the form of DNA analysis by PW9. In fact, the learned judge had stated in his grounds of judgment that the results of the DNA analysis when applied to the facts and circumstances of the case had proven both the accused persons to be liars. The point on the lies committed by the accused person as taken by the learned trial judge was relevant in his consideration and appreciation of evidence led before him. Indeed, in the Singapore case of *Public Prosecutor v Yeo Choon Poh* [1994] 2 SLR 867, it was held that 'lies can in certain circumstances amount to corroboration because it indicates a consciousness of guilt' (see paras 24–25).

(2) It was not in all investigations that fingerprinting must be done to uplift fingerprints at the scene or from the case exhibits. In this case blood stains from the seized exhibits had been sent to PW9 for DNA analysis, which implicated the two accused persons. The presence of fingerprints of other persons would not negative the involvement of the two accused persons, whose DNA profiles matched with bloodstains found on incriminating exhibits seized from the crime scene (see para 27).

(3) In light of the positive DNA match-ups that implicated both the accused persons to this crime, the complaints regarding the identification parades involving PW1 could be said to assume less significance. Even if there was no positive identification of both accused persons by PW1, the DNA evidence was more than damning enough in placing both the accused persons in the overall scenario (see para 28).

(4) There was no suppression of Justira's evidence by the prosecution. In fact he was offered to the defence who elected not to call him as their witness. It was also noted that when the prosecution wanted to call Justira as a rebuttal witness the defence had objected to the move. The defence cannot afford to be blowing hot and cold at the same time. It must be consistent. The prosecution has complete discretion as to who to call as a witness in proving its case. That discretion was exercised after taking into consideration whether there was a material gap created in its case by non-calling of a witness. It was only in cases of suppression of not just any evidence, but evidence of a material character by the prosecution that would justify the invocation of adverse inference (see paras 29–31).

(5) Motive ought not to be mistaken for intention or wrongful knowledge. Intention to commit a crime such as murder must be proven by the prosecution in an offence where mens rea formed part of the essential elements that needed to be proven in order the constitute that offence. In a strict liability offence, mere proof by the prosecution of actus reus would be sufficient to attach criminal liability on the person so charged. In an offence of murder, mens rea was a requisite and constituent element in such a charge. While proof of mens rea was mandatory, lack of proof of motive may not be necessarily fatal to the prosecution's case. An act of killing may be intentional though for no apparent motive. That did not make it any less culpable (see para 32).

(6) Common intention, like all other intentions, was impossible of direct proof unless there was express admission by the perpetrators. Otherwise, it would have to be inferred from the circumstantial evidence that formed part of the prosecution's case. Common intention may be formed immediately before the commission of the offence from the surrounding circumstances of the case under scrutiny. On the overall perusal of the appeal records, taken together the various strands of the circumstantial evidence, particularly the incriminating DNA evidences against the two accused persons, a rope was formed strong enough to conclude that the irresistible conclusion must be that the two accused persons had committed this heinous crime of murder under s 302 of the Code read with common intention under s 34 of the Code (see paras 35–38).

[Bahasa Malaysia summary

Ini merupakan rayuan daripada keputusan hakim Mahkamah Tinggi yang terpelajar yang mensabitkan perayu-perayu untuk bunuh. Kedua-dua perayu dituduh dibawah s 302 dibaca bersama s 34 Kanun Keseksaan untuk pembunuhan si mati. Halim bicara mendapati bahawa perayu pertama bersenjatakan satu kayu manakala perayu kedua bersenjatakan pisau telah memecah masuk melalui pintu belakang dan memecah masuk ke dalam rumah melalui pintu belakang terhadap PW1. PW1 berjaya mengecam kedua-dua tertuduh sewaktu kawad cam dan di mahkamah. Kedua-dua DNA mereka dan

si mati ditemui pada kayu dan sabit yang menunjukan kepada fakta bahawa ekshibit tersebut telah digunakan oleh perayu-perayu untuk menyerang si mati di rumah pada malam tersebut. Berdasarkan kecederaan yang dialami oleh si mati, hakim bicara mendapati bahawa wujud niat unuk menyebabkan mati kepada si mati. Kedua-dua perayu dalam pembelaan mereka meletakkan salah pada Dendeng menyatakan bahawa: (a) Dendeng menghidu gam; (b) Dedeng cuba untuk memasuki rumah tersebut; (c) tertuduh-tertuduh sedang tidur semasa Dendeng mengejutkan mereka; dan (d) kunci Toyota Prado berada dengan Dendeng. Di peringkat rayuan, peguam perayu pertama membangkitkan, dalam petisyen rayuan, isu-isu berikut: (i) kegagalan untuk memanggil Justira, Nizam dan Noraini sebagai saksi; (ii) tiada senjata yang kononnya digunakan oleh penyerang dicamkan oleh mana-mana saksi pendakwaan; (iii) kesan darah yang ditemui di seluar yang kononnya dipakai oleh perayu pertama; (iv) motif pembunuhan; (v) kawad cam yang tidak teratur; (vi) DNA; (vii) beg plastik; dan (viii) niat bersama. Perayu kedua membangkitkan isu bahawa tiada kes prima facie di akhir kes pendakwaan atas alasan berikut: (1) wujud banyak persoalan yang dibangkitkan oleh hakim bicara yang tidak diuruskan dalam kes pendakwaan seperti: (A) siapa yang mengambil kunci Toyota Prado, Justira, perayu pertama? (B) sama ada Justira beraa di dalam atau di rumah tersebut pada masa material semasa kesalahan tersebut kononnya dilakukan? (C) sama ada Nizam dan Noraini bersama-sama perayu pertama dan kedua berkerja dan tinggal di kuarters pekerja; dan (D) sama ada Justira, Nizam dan/atau Noraini tahu apa yang berlaku di dalam rumah tersebut pada waktu tersebut? (2) kegagalan untuk memanggil Justira sebagai saksi sewaktu kes pendakwaan; (3) hakim bicara terkhilaf dari segi fakta dan undang-undang apabila memutuskan penglibatan Justira dalam pembunuhan tersebut tidak dicadangkan kepada saksi pendakwaan kecuali pegawai penyiasatan; dan (4) tiada sampel darah atau DNA diambil daripada Justira.

Diputuskan, mengetepikan rayuan:

(1) Profil DNA yang dipandankan dari kedua-dua perayu dengan ekshibit-ekshibit penting yang dirampas berkaitan dengan siasatan kes telah meletakkan kedua-dua tertuduh di tempat mereka masing-masing. Kesimpulan yang tidak boleh dinafikan adalah kedua-dua tertuduh semestinya berada di tempat kejadian sepertimana dinyatakan oleh W1. Keterangan PW1 disokong dalam bentuk analisa DNA PW9. Hakim terpelajar telah menyatakan dalam alasan penghakimannya bahawa keputusan analisa DNA apabila digunapakai dengan fakta kes membuktikan bahawa kedua-dua tertuduh merupakan penipu. Fakta berkenaan dengan penipuan tertuduh yang diambil oleh hakim bicara adalah relevan dalam pertimbangan dan pengamatan keterangan dihadapannya. Kes Singapura *Public Prosecutor v Yeo Choon Poh* [1994] 2 SLR 867, memputuskan bahawa 'penipuan dalam beberapa kes adalah

terjumlah kepada sokongan kerana ianya menunjukan wujudnya kesedaran salah' (lihat perenggan 24–25).

(2) Bukan dalam semua siasatan bahawa pencarian cap jari mesti dilakukan di tempat kejadian atau dari ekshibit kes. Dalam kes ini, kesan darah dari ekshibit yang dirampas telah dihantar kepada PW9 untuk analisa DNA, yang membabitkan kedua-dua tertuduh. Kehadiran cap jari orang lain tidak akan menidakkan penglibatan kedua-dua tertuduh yang mana profil DNA mereka berpadanan dengan ekshbit yang dirampas dari tempat kejadian (lihat perenggan 27).

(3) Memandangkan wujud padanan DNA positif yang membabitkan kedua-dua tertuduh kepada kesalahan ini, aduan berkenaan dengan kawad cam yang melibatkan PW1 boleh dikatakan tidak begitu signifikan, jikalau tiada pengecaman positif kedua-dua tertuduh oleh PW1, keterangan DNA lebih dari mencukupi untuk meletakkan kedua-dua tertuduh dalam senario keseluruhan (lihat perenggan 28).

(4) Tiada suppression keterangan Justira oleh pihak pendakwaan. Walhal dia ditawarkan kepada pihak pembelaan yang memilih untuk tidak memanggilnya sebagai saksi mereka. Ianya juga diambil kira bahawa semasa pendakwaan memohon untuk memanggil Justira sebagai saksi rebuttal telah di bantah oleh pihak pembelaan. Pihak pembelaan tidak boleh 'be blowing hot and cold' pada waktu yang sama. Ianya perlulah konsisten. Pendakwaan mempunyai budi bicara penuh untuk menentukan siapa yang akan dipanggil sebagai saksi untuk membuktikan kesnya. Budi bicara itu jalankan selepas mengambil kira sama ada wujud atau tidak kelompangan material dalam kesnya melalui kegagalan untuk memanggil seorang saksi. Hanya dalam kes suppression dan bukan apa-apa keterangan, tetapi keterangan material oleh pendakwaan akan membolehkan pemakaian tanggapan buruk (lihat perenggan 29–31).

(5) Motif tidak boleh disilap bandingan dengan niat atau pengetahuan salah. Niat untuk melakuan kesalahan seperti bunuh hendaklah dibuktikan oleh pendakwaan dalam kesalahan yang mana mens rea merupakan sebahagian daripada intipati asas yang perlu dibuktikan untuk membuktikan kesalahan tersebut. Pembuktian mens rea adalah wajib, manakala ketiadaan bukti motif tidak semestinya akan menjejaskan kes pendakwaan. Tindakan membunuh mungkin dengan sengaja, namun tanpa apa-apa motif. Perkara ini tidak membuatkan ianya tidak salah (lihat perenggan 32).

(6) Niat bersama, sepertimana semua niat lain, adalah mustahil untuk dibuktikan secara terus kecuali mana wujud pengakuan oleh pelaku salah. Kalau tidak, ianya perlu dikiaskan berdasarkan keterangan keadaan yang wujud sebahagian daripada kes pendakwaan. Niat bersama boleh

wujud sejurus sebelum perlakuan kesalahan. Berdasarkan pengamatan keseluruhan rekod rayuan, mengambil kira semua keterangan keadaan, terutamanya keterangan DNA terhadap kedua-dua tertuduh, satu tali yang cukup kuat telah terbentuk untuk menyimpulkan bahawa kedua-dua terrtuduh telah melakukan jenayah keji iaitu bunuh ini dibawah s 302 dibaca dengan niat bersama dibawah s 34 Kanun tersebut (lihat perenggan 35–38).]

Notes

For cases on adverse inference in general, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 374–563.

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

Cases referred to

Barendra Kumar Ghose v King-Emperor (1924) 27 Bom LR 148, HC (refd)
Basdev v The State of Pepsu [1956] Cr LJ 919, SC (refd)
BN Srikantiah & Others v The State of Mysore 1958 AIR 672, SC (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306, FC (refd)
K Gopal Reddy v State of Andhra Pradesh 1979 AIR 387, SC (refd)
Krishna Govind Patil vs State of Maharashtra (1963) 65 Bom LR 789, SC (refd)
Mahbub Shah v Emperor (1945) 47 BOMLR 941, HC (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Murgi Munda v King-Emperor (1939) ILR 18 Pat 101 (refd)
PP v Yeo Choon Poh [1994] 2 SLR 867, CA (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (refd)
PV Sivarajan v The Union of India And Another 1959 AIR 556; [1959] Ker 319, SC (refd)
Tham Kai Yau & Ors v Public Prosecutor [1977] 1 MLJ 174, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212; [1980] 1 LNS 138, FC (refd)
Woolmington v The Director of Public Prosecutions [1935] AC 462, HL (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Penal Code ss 34, 182A, 300, 302

Appeal from: Criminal Trial No KCH-45B-1/5 of 2015 (High Court, Kuching)

CM Sundram (CM Sundram & Co) for the first appellant.
Fung Lee Fook (Fung Lee Fook) for the second appellant.

Norinna bt Bahadun (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

THE CHARGE

> Bahawa kamu bersama-sama pada 30.1.2015, di antara jam 9.00 malam sehingga 11.00 malam, di No 82, Matang Family Park, Jalan Matang, dalam daerah Kuching, di dalam negeri Sarawak, bagi mencapai niat bersama kamu telah membunuh Hii Nek Kah (L) (KPT: 481010-13-5727), dan dengan itu kamu telah melakukan suatu kesalahan dibawah Seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 kanun yang sama.

BRIEF FACTS OF THE CASE

[1] The fact of the case could be deduced from the prosecution evidence. It may be stated as follows: Hii Nek Kah ('the deceased') was the owner of the house situated at the address as per the charge. At that time, he was renovating the house to operate it as a home-stay business. He had engaged a contractor to carry out the renovations. Some employees of the contractor were given a place to stay at the workers' quarters near the said house during the renovations. One Lee Nam Huing ('PW1'), a friend of the deceased, who helped with painting in the house, stayed in the house to accompany the deceased.

[2] On 30 January 2015 at about 9pm, the deceased woke PW1 from his sleep after the deceased's car alarm went off. While they were talking in the dining room, two persons entered the house through the back door of the house, one with a knife and one with a stick, approaching towards them. PW1, upon seeing the two persons armed with the weapons, warned the deceased of the intruders and ran inside and locked himself in his bedroom. He heard the deceased calling out for help and someone knocking on the door trying to open the door of his bedroom. PW1 escaped from his room by using the bedroom window and ran to the road nearby seeking for help.

[3] PW1 stopped a car asking for help from the driver who took him to a police station where PW1 told the police about what happened. He also informed the family of the deceased. Two sons of the deceased including Hii Ing Poh ('PW2') arrived at the house before the police. They found the gate was not in its place and their father's Toyota Prado vehicle had gone missing. They called out their father's name but there was no answer and the front door of the house was locked.

[4] PW2 went to the back of the house and found the backdoor open and there was a hole in the door. He entered the house and found his father lying on

the floor. The father was dead. He found that a drawer in his father's bedroom had been forced open, and cash amounting to RM7,000 and his father's two handphones were missing. Later, PW1 lodged a police report (exh P4). PW2 also lodged a police report (exh P18). A

[5] At about 11pm of the same night, a police mobile patrol, carrying out random checks at the Kuching waterfront, stopped a Toyota Prado bearing registration No QC 9935. There were six persons in the vehicle, later identified as Mohamad Nazarie bin Halidi ('the first accused'), Suffry ak Empi ('the second accused'), Nizam bin Roslan ('Nizam'), Noraini bt Kifflie ('Noraini'), Justira bin Mohd Kuan who was also known as Dedeng ('Justira/Dedeng') and a child. When the police stopped the vehicle, Nizam and Justira tried to run away. The police managed to apprehend Nizam but failed to apprehend Justira. B C

[6] The first accused, second accused, Nizam and Noraini were detained for questioning at the Kuching Central Police Station (CPS). PW2 identified the said Toyota Prado vehicle as belonging to his deceased father. D

[7] After completion of police investigations, the first and second accused persons were charged for the murder as per the charge. The other three adult persons inside the Toyota Prada that was stopped later that night by the police at the Kuching waterfront were not. E

THE LEARNED TRIAL JUDGE'S FINDINGS AT THE END OF PROSECUTION CASE F

[8] Based on the evidence adduced by PW1 and other circumstantial evidence, the court found that at that night it was the first accused armed with the stick and the second accused armed with the knife who had broken the backdoor and entered the house from the backdoor approaching towards PW1 and the deceased. PW1 was able to identify them during an identification parade and in court because he was face to face with them at that night and he had seen them working at the house before. Their DNA and that of the deceased found on the stick and the sickle irresistibly pointed to the fact they used the said exhibits to attack the deceased in the house on that night. G H

[9] Based on the multiple injuries sustained by the deceased, the learned trial judge found that there was an intention to cause death to the deceased. It was also in the evidence of Norliza bt Ibrahim, PW8, the pathologist/forensic medicine specialist that the injuries sustained by the deceased were sufficient in the course of nature to cause the death of the deceased. It was also in evidence that those injuries were defensive injuries. No bloodstains or DNA belonging to Nizam, Noraini or Justira were found on the stick, sickle or green plastic bag containing the tin of glue or inside the house. This had excluded the presence I

of Nizam, Noraini and Justira inside the house on that night where the deceased was attacked and killed. This had irresistibly pointed to the fact that it was the first and second accused who had mens rea and who had attacked and caused the death of the deceased in the house.

[10] Following the above, it was the first and second accused who had ransacked the house, including the drawer in the deceased's bedroom with the cash and handphones missing. This was the bedroom where the green plastic bag, with the DNA of the second accused on it, containing the tin of glue, was found. These pointed to the fact they had a motive to rob and attack the deceased in the house on that night.

[11] Based on the facts and circumstances of the case, it was found by the learned trial judge that there was a pre-concert or pre-planning or meeting of minds between the first and second accused to rob and attack the deceased which caused the death of the deceased.

[12] On evidence adduced, the learned trial judge found that the prosecution has proved the essential ingredients of the charge under s 302 read together with s 34 of the Penal Code and that it has made out a prima facie case against the first and second accused. Thus, both of them were called to enter their defence.

THE DEFENCE CASE

[13] Briefly, both the accused persons had put the blame onto Dedeng saying that: (i) Dedeng was sniffing glue; (ii) Dedeng tried to enter the house; (iii) the accused persons were sleeping when Dedeng woke them up; and (iv) the key of the Toyota Prado was with Dedeng.

FINDINGS AND DECISION OF THE HIGH COURT

[14] Based on the evidence adduced in court, the learned trial judge had found that the defence had failed to raise a doubt in the prosecution's case as well as to their guilt. On the totality of the evidence adduced, the learned trial judge found that the prosecution had also proved its case against each of the two accused persons beyond reasonable doubt. The court found both accused persons guilty of the charge preferred against them and he had proceeded to convict both of them of the offence under s 302 of the Penal Code, read together with s 34 of the Penal Code as per the charge preferred against them. Each of the accused persons was sentenced to death by hanging.

THE APPEALS

[15] Aggrieved by such decision of the learned trial judge, both the accused persons appeal against it to the Court of Appeal. Both appeals were heard together before us. Parties will be referred to as they were addressed in the High Court proceedings before the learned trial judge.

[16] Before us, defence counsel for the first accused, Mr CM Sundram raised in the petition of appeal, the following issues:

(a) failure to call Justira, Nizam and Noraini as witnesses;

(b) no weapons purportedly used by the assailants were identified by any of the prosecution witnesses;

(c) the trace of blood found on the trousers allegedly worn by the first accused;

(d) motive of murder;

(e) the improper identification parade;

(f) DNA;

(g) plastic bag; and

(h) common intention.

[17] While the second accused, represented by learned counsel, Mr Fung Lee Fook had complained, in his petition of appeal, that there is no prima facie case at the end of prosecution case, on the following grounds:

(a) many questions raised by the trial judge were not dealt with during prosecution case such as:

(i) who took the vehicle Toyota Prado's key, Justira, the first accused, or the second accused?

(ii) was Justira in or at the house at the material time when the alleged offence was committed?

(iii) were Nizam and Noraini together with the first and second accused working and staying at the worker's quarters? and

(iv) did Justira, Nizam and/or Noraini know what happened in the house at the time?

(b) failure to call Justira as witness during prosecution case;

(c) the learned trial judge erred in fact and in law when he ruled that Justira's involvement in the murder was not put to the prosecution's witnesses except ASP Suriah bt Salleh (PW18), the investigating officer; and

(d) no blood sample or DNA were taken from Justira.

OUR FINDINGS

[18] After hearing both parties and perusing all the relevant materials before us, we had unanimously concluded that both appeals had no merits and were therefore dismissed by us. As such, the conviction as well as the sentence by the High Court judge pertaining to each of the accused persons were thereby affirmed. These are now our reasons of having so decided. We will proceed to address the various issues that were emphasised by learned counsel on behalf of both the accused persons.

[19] The main issue that was raised by En Sundram, learned counsel for the first accused person was that the evidence of PW1 ought not to be believed as he did not see the accused persons on the night of the incident committing the offence. In his evidence, PW1 said he recognised the two accused persons as workers employed by the deceased in the construction work to the house. He had identified them at the identification parades in the course of police investigation into this case.

[20] The learned trial judge, as noted by us, had taken into account not just the evidence of PW1 before he decided to act on it. He had taken into account other available evidence that were adduced before him in the course of the prosecution case. Crucial among these had been the DNA evidence, as testified before him by the chemist, PW9. The evidence on the DNA profiling by PW9 was independent in nature. PW9 had no interest in this case other than to present as best she could, the results of her DNA analysis.

[21] Indeed, the issue on the DNA was also raised during the course of these appeals. It was submitted before us that the there was a minor source of DNA which could not be established as to its origin. This had led to speculation by the defence that it could have been anyone's DNA, including Dedeng's. Actually this issue on there being a minor contributor had pertained to the mixed DNA profile found on sickle, where in fact the minor contributor in the mixed DNA profile was identified as coming from the deceased, whereas the major contributor was determined as having originated from the second accused person. So, the contention that the minor contributor could have come from any other persons, as was urged upon us could not hold water. Indeed, the proven facts remained that the respective DNA profiles were consistent with those of both the accused persons, as had been established as found by the chemist's findings on the DNA profiling. The minor contributor was also determined to be the deceased. These findings were not challenged. The DNA profile of the first accused person was found on the stick with nails on it. This stick was used to assault the deceased resulting in his death. The

DNA of the deceased person was also found, from the analysis done by the chemist PW9 of blood stain found on the shorts worn by the first accused person on the fateful night of the incident.

[22] After considering the DNA evidence, and the findings from which the report of PW9 had revealed, the learned trial judge had then come to this conclusion, in para 61 of his grounds of judgment:

> [61] The evidence showed that PW9 had examined a pair of short pants labelled as E20 (exh P29B) bearing stains indicating the presence of blood. On DNA profiles developed from bloodstains on the stick (P13) and P29B, she found that they matched with the DNA profile developed from the blood specimen labelled as E13 (exh P61C) belonging to the deceased. The bloodstains on the stick and on this pair of trousers came from the deceased. PW1 had testified that the first accused entered the house armed with a stick on that night. The presence of the deceased's blood on the stick pointed to the fact that it was used to attack the deceased on that night. The presence of the deceased's blood on the trousers worn by the first accused on that night pointed to the fact that the first accused was present and in close proximity to the deceased at the time of the attack.

[23] That was in respect of the first accused person. In respect of the second accused person, the learned trial judge concluded on this issue at para 66 of his grounds of judgment, like so:

> [66] The presence of the DNA of the second accused on the sickle and on the plastic bag found in two locations in the house on that night, in the living room and in the deceased's bedroom, irresistibly pointed to his presence in the house on that night. This corroborated the testimony of PW1 that he saw the second accused armed with a knife entered the house from the backdoor of the house on that night.

He continued on at para 67 in the following manner:

> The presence of the DNA of the second accused and the DNA of the deceased on the sickle irresistibly pointed to the fact that the sickle was used to attack the deceased on that night which explained the presence of their DNA on the sickle. The sickle was a sharp object. PW8 testified that the slash wounds at injuries Nos 6, 8, and 11 were consistent to be caused by a sharp and heavy weapon.

[24] In short, the matching of the DNA profiles of the two accused persons with the crucial exhibits seized in relation to the investigation into this case had literally put the two accused persons in their respective place, in the perspective of this case. The learned trial judge had found as a fact that the two accused persons were present at the crime scene because their DNA profiles matched with the incriminating exhibits found at the said criminal scene. The irresistible conclusion in such circumstances must be that, as was concluded by the learned trial judge, the two accused persons must be at the crime scene at the time as alleged by PW1. With respect, we found no reason to depart from the learned trial judge's conclusion. In other words, the evidence of PW1,

A which in itself is not inherently incredible, had been vindicated by the independent DNA evidence emanating from the objective analysis by PW9. Put simply, the evidence of PW1 had been corroborated by independent evidence in the form of DNA analysis by PW9. In fact, the learned trial judge had stated in his grounds of judgment that the results of the DNA analysis
B when applied to the facts and circumstances of this case had proven both the accused persons to be liars. In para 102 of his grounds of judgment, the learned trial judge had said: 'The DNA evidence not only contradicted their defence but found them to be lying'.

C

[25] With respect, we found the point on the lies committed by the accused person as taken by the learned trial judge to be relevant in his consideration and appreciation of the evidence led before him. Indeed, in the Singapore case of *Public Prosecutor v Yeo Choon Poh* [1994] 2 SLR 867, it was held, at p 876 that
D 'lies can in certain circumstances amount to corroboration because it indicates a consciousness of guilt'. Here, both the accused were lying as to their involvement in the commission of the murder of the deceased. Their lies were borne out by the independent DNA analysis which put them in their proper places in the commission of this crime. We therefore found no merits in the
E contention that was urged upon us by learned counsel for both accused persons.

[26] On the issue of identification parades, it was submitted by learned counsel for the accused persons that the identification parades were defective.
F This issue was also raised in submissions before the learned trial judge that PW1 had difficulty in identifying the accused persons and it was alleged in submissions that the police officer had coached PW1 so as to be enable PW1 to positively identify the accused persons. However, as noted by the learned trial judge, there were no such allegations put to PW1 nor to the police officer
G concerned when these key witnesses were in the witness box during cross-examination. It needs no reiteration from us that failure to cross-examine a witness amounts in law, to accepting the testimony that was not so cross-examined (see the case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138).

H

[27] Another issue that was raised on appeal was the issue of failure to uplift fingerprints at the crime scene by the police. Now, it is not in all investigations that fingerprinting must be done to uplift fingerprints at the scene or from case exhibits. In this case blood stains from the seized exhibits had been sent for
I DNA by the chemist PW9 for analysis. As a result of the analysis, the two accused persons now appealing before us were directly implicated as their DNA profiles had matched with the exhibits found at the crime scene. What utility would be achieved by getting fingerprints from the scene as even if such exercise were to show other persons may be present at the scene that fact could not

detract from the fact that both the accused persons charged in this case were implicated in the commission of this offence. In other words, the presence of fingerprints of other persons would not negative the involvement of the two accused persons, whose DNA profiles matched with bloodstains found on incriminating exhibits seized from the crime scene, in the scheme of things related to the charge that was preferred against them. We therefore saw no merits in the complaint raised by learned counsel, based upon the lack of uplifting of fingerprint in this case. The circumstances obtaining in this case did not require that uplifting of fingerprints ought to have been done by the police. Not in all investigations uplifting of the finger prints must be done by the police. In the presence of other overwhelming evidence already in the possession of the police investigation, such exercise pertaining to uplifting of fingerprints may not become necessary. In other words, it depends on the circumstances surrounding the investigation at the material time at the crime scene (see the Federal Court case of *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233). Uplifting of fingerprints is but a tool in the armoury available to the investigating officer, among others, and whether he needs to employ that tool in the course of his investigation, must be dictated by the peculiar circumstances of the particular investigating that is being undertaken by him. One of the complaints by the second accused person was that the DNA profile of Dedeng was never developed. As was alluded to by us above, even if someone else's DNA was found on the exhibits, that factum, would not have the effect of negating the presence of both the accused persons at the crime scene. It may have the effect of adding to the number of persons being accused of the offence of murdering the deceased, but it definitely would not reduce such number of accused persons to answer to the charge.

[28] In fact, in light of the positive DNA match-ups that implicated both the accused persons to this crime, the complaints regarding the identification parades involving PW1 can be said to assume less significance. Even if there is no positive identification of both accused persons by PW1, the DNA evidence was more than damning enough in placing both the accused persons in the overall scenario pertaining to this case in terms of their participation therein. Their denial of being involved in the murder of the defenceless deceased on that fateful night in Matang in Kuching flew across the uncontroverted and independent DNA evidence, which the learned trial judge correctly observed had put them as having been in close proximity with the deceased. The DNA evidence also put paid to the complaint on alleged failure on the part of the police investigation to uplift fingerprints at the scene of crime.

[29] Learned counsel had urged the court to invoke adverse inference under s 114 illustration (g) of the Evidence Act 1950 against the prosecution's case. Under the circumstances as alluded to by us in the immediate preceding paragraph, no such invocation would have been justified. There was no

suppression of Justira's evidence by the prosecution. In fact, he was offered to the defence who had elected not to call him as their witness. It is also noted that when the prosecution wanted to call Justira as a rebuttal witness, the defence had objected to the move. The defence cannot afford to be blowing hot and cold at the same time. It must be consistent. The learned trial judge had dealt with this issue and concluded in his ground of judgment, like so:

> [25] On the facts and circumstances of the case, there was nothing to suggest that in not calling them as witnesses that the prosecution was suppressing evidence and there was no ground to invoke any adverse inference against the prosecution as such: see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; *Hazly bin Ali v Public Prosecutor and another appeal* [2015] 1 MLJ 527; *Amri bin Ibrahim & Anor v Public Prosecutor and another appeal* [2017] 1 MLJ 1. The burden was still on the prosecution to prove its case against the accused.

[30] On the issue of non-calling of Justira, otherwise referred to as 'Dedeng', as raised by learned counsel for the first accused person, the prosecution has complete discretion as to who to call as a witness in proving its case. That discretion is exercised after taking into consideration whether a material gap is created in its case by non-calling of a witness to testify. It would be a valid matter to consider as well whether the non-calling of a witness had been actuated by an oblique motive on the part of the prosecution to suppress the production of a material witness. In this case, Justira was not material in proving the charge against both accused persons. The prosecution offered Justira to the appellants at the end of the prosecution case, but the offer was not taken up by the either of the appellants. We noted too that, in fact, the defence had objected to the prosecution wanting to call Justira as a rebuttal witness.

[31] On this adverse inference issue, the law is trite. As was rightly alluded to by the learned trial judge, it was only in cases of suppression of not just any evidence, but evidence of a material character by the prosecution, that would justify the invocation of adverse inference. Nothing short of that would do. That much is clear, as could be gleaned from the high authority in the case of *Munusamy v Public Prosecutor*. Even if Justira or 'Dedeng' was a material witness, which according to the prosecution he was not, he was nevertheless offered to the defence and on record, that offer was not accepted by the defence. Two things can be deduced from that factual circumstance namely, first, there was no suppression by the prosecution, and second, the defence cannot now be heard to complain that the accused persons had been unfairly prejudiced in the circumstances. We therefore found the issue on adverse inference, as raised and contended by the defence to be devoid of any merit and could not be sustained in law.

[32] Learned counsel for the accused person also raised the issue of motive, or the lack thereof, in relation to this heinous murder, allegedly committed by

the accused persons. The word 'motive' is derived from the Latin word 'motuvus' that means 'moving'. It is the reason that motivates one to act. Motive ought not to be mistaken for intention or wrongful knowledge (see, the case of *Basdev v The State of Pepsu* [1956] Cr LJ 919; *PV Sivarajan v The Union of India And Another* 1959 AIR 556; [1959] Ker 319). The law on motive in relation to the offence of murder is rather settled. Intention to commit a crime such as murder must be proven by the prosecution in an offence where mens rea (the guilty mind) forms part of the essential elements that needed to be proven in order to constitute that offence. In a strict liability offence, mere proof by the prosecution of actus reus (the impugned act) would be sufficient to attach criminal liability on the person so charged. In an offence of murder, mens rea is a requisite and constituent element in such a charge. This may be proved either by way of direct evidence or by way of irresistible inference from circumstantial evidence. While proof of intention or mens rea is mandatory, lack of proof of motive may not be necessarily fatal to the prosecution case. An act of killing may be intentional though for no apparent motive. That does not make it any less culpable. Indeed, it has been decided in the case of *Murgi Munda v King-Emperor* (1939) ILR 18 Pat 101 that the question of motive is not material where there is direct evidence of the accused and the acts themselves are themselves sufficient to disclose the intention of the actor.

[33] Now, the evidence in this case had shown that, when the children of the deceased came to the house after being informed by PW1, they had proceeded to enter the bedroom where their late father used to occupy. There, they found the place had been ransacked. Upon further checking, they found out that two hand phones were missing and cash monies were missing. From this, the learned trial judge had concluded as follows, at para 70:

> Following the above, it was the first and second accused who had ransacked the house, including the drawer in the deceased's bedroom with the cash and hand-phones missing. This was the bedroom where the green plastic bag, with the DNA of the second accused on it, containing the tin of glue, was found. These pointed to the fact they had a motive to rob and attack the deceased in the house on that night although the prosecution did not lead evidence whether the cash and hand-phones were recovered from the accused.

[34] Having perused through the relevant evidence on this issue, we could not in all fairness fault the learned trial judge for having so concluded. We found his conclusion on the motive to be justified and sound. Again, the complaint by the accused persons on the issue of motive could not be sustained by us.

[35] Then, there was the issue on s 34 of the Penal Code. It was the case for the defence that the prosecution had failed to establish that common intention between the two accused persons in committing the murder. Common

intention, just like other intentions, is impossible of direct proof unless there is express admission by the perpetrators. Otherwise, it will have to be inferred from the circumstantial evidence that form part of the prosecution case, as the case may be. Having said that, common intention, may be formed immediately before the commission of the offence from the surrounding circumstances of the case under scrutiny. We noted that in para 71 of his grounds of judgment, the learned trial judge had addressed his mind on this concept of s 34 of the Penal Code. The essence of s 34 of the Penal Code may safely be derived from the Privy Council decision in the case of *Mahbub Shah v Emperor* (1945) 47 BOMLR 941, emanating from an appeal from India. Their Lordships stated that the essence of the joint liability that was provided for under s 34 of the Penal Code was to be found in the existence of common intention. Under this provision, the doing of several acts regardless of whether they are similar or diverse, by several persons, as long as these acts are done in furtherance of a common intention, then each of those persons is liable for result of them all as if he had done those acts himself. This interpretation was given by the court in the case of *Barendra Kumar Ghose* as early as in 1924 (see, *Barendra Kumar Ghose v King-Emperor* (1924) 27 Bom LR 148). The Supreme Court of India had ruled in the case of *Krishna Govind Patil vs State of Maharashtra* (1963) 65 Bom LR 789 (SC) that the pre-arranged plan may develop on the spot during the course of the commission of the offence, but the crucial circumstance is that the said plan must precede the act constituting the offence. According to the Indian Supreme Court, this section only lays down a principle of joint criminal liability, it is a rule of evidence and does not create a substantive offence (see, the case of *BN Srikantiah & Others v The State of Mysore* 1958 AIR 672).

[36] The learned trial judge in the case before us had alluded himself to the rationale behind s 34 of the Penal Code and its operability. We reproduce the said para 71 below:

> [71] In a criminal prosecution where s 34 of the Penal Code is invoked, it is not incumbent on the prosecution to prove that there existed between the accused a common intention to commit the crime actually committed. As long as there is a common intention to commit a criminal act, which resulted in the commission of a crime actually committed, s 34 operates against all the persons involved in the commission of the actual crime: *Farose Tamure Mohamad Khan v PP & Other Appeals* [2016] 9 CLJ 769. A pre-concert or pre-planning may develop on the spot or during the course of the commission of the offence but the crucial test is that such a plan must precede the act constituting the offence. The existence of common intention is a question of fact: *Wan Yurillhami Wan Yaacob & Anor v PP* [2010] 1 CLJ 17; see also *Low Kian Boon & Anor v PP* [2010] 5 CLJ 489. Based on the facts and circumstances of the case, there was a pre-concert or pre-planning or meeting of minds between the first and second accused to rob and attack the deceased which caused the death of the deceased.

[37] The learned DPP had submitted that he agreed that the case of the prosecution was mainly circumstantial. There is nothing inherently wrong in that submission. A fact may be proved by way of either direct or by way of circumstantial evidence. In the context of a murder charge, where the case for the prosecution is premised primarily on circumstantial evidence, the circumstantial evidence taken together must form a rope strong enough to hang the accused person (see, the Federal Court decision in *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306 and see, the case of *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307).

[38] On the overall perusal of the appeal records, we were of the unanimous view that taken together the various strands of the circumstantial evidence, particularly the incriminating DNA evidences against the two accused persons, a rope was formed, strong enough to conclude that the irresistible conclusion must be that the two accused persons had committed this heinous crime of murder under s 302 of the Penal Code, that took away the life of the deceased on the night referred to in the charge that was preferred against both the accused persons, read with common intention under s 34 of the Penal Code.

[39] In this regard, we noted the manner in which the learned trial judge had directed himself on the burden of proof in a criminal trial such as this one. It appeared at para 82 of his grounds of judgment, like so:

> In a criminal trial the onus of proving the guilt of an accused person beyond reasonable doubt, which never shifts, lies throughout on the prosecution. The burden is not on the accused persons to prove their innocence but merely to offer an explanation which may reasonably be true or which raises a reasonable doubt as to their guilt: see *Saminathan & Ors v Public Prosecutor* [1955] 21 MLJ 121; *Public Prosecutor v Datuk Haji Harun bin Haji ldris & Ors* [1977] 1 MLJ 180. In considering the defence the court is guided by the principles set out in the case of *Mat v Public Prosecutor* [1963] 1 MLJ 263.

[40] We found that direction to be a correct direction by the learned trial judge. Indeed, Lord Sankey in the famous case of *Woolmington v The Director of Public Prosecutions* [1935] AC 462 had said that 'throughout the English criminal law one golden rule thread is always seen, that it is the duty of the prosecution to prove the guilt of the prisoner'. We follow and practise that same golden rule and like England, the prosecutor here has to discharge that burden on the standard of proof beyond reasonable doubt. Denning J (as he then was) in the oft-cited case of *Miller v Minister of Pensions* [1947] 2 All ER 372 had explained what 'beyond reasonable doubt' meant, and it is this, that 'it need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflate the cause of justice. If the evidence is strong against a man as to leave

only a remote possibility, in his favour, which can be dismissed with the sentence-of course, it is possible but not in the least probable-the case is proved beyond reasonable doubt but nothing short of this will suffice'.

[41] In our context, the proof led by the prosecution must be such that it satisfies what is contained under s 182A of the Criminal Procedure Code. We noted that the learned trial judge had cited a litany of cases in his grounds of judgement pertaining to this aspect of the law. We noted as well that the learned trial judge was very well aware of this, as can be seen in para 72 of his grounds of judgment, where he had said:

> [72] On evidence adduced, the prosecution has proved the essential ingredients of the charge under s 302 read together with s 34 of the Penal Code and has made out a prima facie case against the first and second accused. They had been called to enter their defence.

[42] Now, in the second last paragraph in his grounds of judgment, the learned trial judge wrote:

> [105] At the conclusion of the trial, on the totality of the evidence adduced, the prosecution has proved its case against each of the two accused beyond reasonable doubt.

[43] He had earlier found that both the accused had failed to raise a reasonable doubt as to their guilt. Although the law says that an accused person charged with a criminal offence only needs to raise a reasonable doubt in order to get an acquittal that does not mean that he can just advance a defence that would create fanciful doubts in the mind of the trial judge hearing his case. To amount to a 'doubt' that would, in law, entitle him to an acquittal, it must be a 'reasonable doubt'. What would amount, in law, as a 'reasonable doubt' had been defined by Lord Denning in the same case of *Miller v Minister of Pensions*, as may be surmised as follows: it must be a doubt that lingers on the mind of a reasonable person, not of the type which is fanciful nor a fleeting/flitting one. It had also been remarked that a 'reasonable doubt' did not mean some light, airy, insubstantial doubt that may flit through the minds of any of us about almost anything at some time or other; it does not mean a doubt begotten by sympathy out of reluctance to convict; it means a real doubt, a doubt founded upon reasons (see the case of *K Gopal Reddy v State of Andhra Pradesh* 1979 AIR 387 (Supreme Court of India, 22 November 1978). Indeed, some legal commentators had also attempted to define a 'reasonable doubt' to mean, the doubt of men of good sense, not that of imbeciles or fools.

[44] In considering both the accused person's version of defence the learned trial judge was guided by the principles enunciated in *Mat v Public Prosecutor* [1963] 1 MLJ 263 as can be seen in para 82 of his grounds of judgment. His ultimate finding at the end of the defence case has been that both the accused

persons had failed to raise a reasonable doubt in the prosecution case as well as to their guilt as can be seen in para 104 of his grounds of judgment. He then proceeded to convict both of them for murder under s 302 of the Penal Code, read with common intention under s 34 of the same Code, as charged. We could not disagree with his finding as such.

[45] All the issues raised by the learned counsel for the first accused person were devoid of merit. He was sufficiently positively identified by PW1 who saw him face to face on the night in question in the kitchen of the deceased's house and at later, during the identification parade. The independent DNA evidence had put the first accused person in his place. It corroborated the evidence of PW1 regarding the presence of the first accused at the crime scene. No adverse inference could, in law, in the circumstances of this case, be invoked against the prosecution for the non-calling of Justina or Dedeng. No material gap was created on the prosecution case by the decision of the prosecution not to call Dedeng. In the context of *Munusamy* case there obviously no suppression of material witness. Indeed he was offered to the defence which offer was not accepted. The defence of the first accused person showed that he was placing the entire blame on Dedeng as the culprit. This was never put to the prosecution witnesses. When the prosecution applied to call Dedeng as a rebuttal witness, the defence had objected to the same. Yet, the defence was clearly generous in pouring the blame on Dedeng and that both of the accused persons were at the material time sleeping. The learned trial judge was correct when he noted that while the DNA profiles matched with the incriminating exhibits seized at the crime scene, none had matched with Dedeng's. The attempt by the second accused person to put the blame on Dedeng as the person who had carried the plastic bag which contained the tin of glue was effectively negatived by the presence of a DNA profile found by PW9 as belonging to the second accused himself. As was alluded to by us prior in this judgment, at para 26 herein, a lie by an accused person operates to corroborate his guilty consciousness.

[46] As regards the second accused person, it was his main complaint that no prima facie case had been established at the end of the prosecution case. Having perused through the notes of proceedings and the appeal records, we were unanimous in our view that the learned trial judge was correct in holding the prosecution had successfully proven its case beyond reasonable doubt at the end of its case, thus justifying him calling both the accused persons to enter on its defence, as a prima facie case had been established by the prosecution. The learned trial judge was correct in calling for both the accused persons to enter their respective defence to the charge of murder, read with common intention. Both were armed when PW1 saw them entering the kitchen of the deceased's house. One with a stick, while the other with what looked to PW1 as a knife, which the former had carried behind his back. PW1 later heard the deceased's

voice shouting out his name from the kitchen. Later, the deceased's blood was found splattered on the kitchen wall and in the kitchen area. The deceased, after a post mortem, was found to have suffered 21 defensive wounds on his person of which the injuries sustained on his head were fatal. Those injuries were caused, according to PW8 by blunt force trauma consistent with being hit by a blunt object such as wood, iron or any similar object (see, evidence of PW8 at pp 265–266 in record of appeal, Vol 2(2)). The law on murder is trite, even a single injury which proves to be the fatal cause of death, can be used as a basis to convict if that single injury was intentionally inflicted to cause the death of the deceased. In fact the Federal Court had occasion to state that the deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. It will be culpable homicide not amounting to murder if death is the *likely* result of the assault and it will be murder if death is the *most probable* result. It depends on the risk it poses to human life (see, the Federal Court decision in the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174).

[47] In this appeal before us, there were 21 injuries and the ones inflicted to the head of the deceased were described by PW9, the pathologist, to be of a kind which is sufficient in the ordinary course of nature to cause death. Under s 302 of the Penal Code, among others, it is murder, if a person intends and indeed inflicts an injury on another of a kind which is sufficient in the normal course of nature to cause death (see the third limb to s 300 of the Penal Code).

[48] PW1 saw both the accused persons armed with weapons that turned out to be a piece of stick with nails and a knife. The injuries were caused by objects consistent with those weapons seized at the crime scene. Both the accused persons denied having committed the offence at all. They tried to shift the blame on Dedeng. As was noted by the learned trial judge, it was never the defence of the accused persons that the injuries sustained by the deceased were caused accidentally. Blood was splattered on various areas in the kitchen. The deceased was heard by PW1 from inside his locked bedroom shouting out the latter's name. The pathologist, Norliza bt Ibrahim (PW8) described the fatal injuries sustained by the deceased. He also sustained defensive wounds on his arms and hands as he tried to deflect his assailants' blows. In other words, those injuries to the deceased's head were intentionally inflicted by the perpetrators. And those injuries were in the opinion of PW8, sufficient in the ordinary course of nature to cause death. In the case before us, PW8 was of the opinion that the injuries sustained by the deceased was of such nature, as can be seen at p 144 record of appeal, Vol 3(1) where she stated in her witness statement, like so: 'It is in my opinion that are injury Nos 6, 7 and 8 are sufficient in the order of nature to cause death'. Indeed in this case, the deceased had succumbed to those injuries.

[49] Dedeng's DNA was not found from anywhere at the scene nor from any object seized therefrom. A dead man may tell no tale, but the DNA profiles of both the accused persons were shown to be present in a very incriminating way in relation to this case. The second accused, for instance, tried to deny having anything to do with this case, but the probability of a randomly selected unrelated individual with a DNA profile matching the profile of 'E48' (the second accused) being a contributor of this mixed profile was approximately set at 1 in 23.5 trillion as calculated based on the Malaysian Iban population database, as testified by PW8, the chemist. The same can also be said of the first accused person's DNA ('E43'), as the probability of his DNA match with a randomly selected unrelated individual was approximately 1 in 120 quadrillion as calculated based on the Malaysian Malay population database. To put it mildly, that is one heck of a remote probability, it would be nigh to impossible of it ever happening. That was one way of saying that the probability of a match with the each of the accused persons' DNA with another person was as good as *zilch*. A question was asked of PW9 by the prosecutor as follows: 'How unique is a person's DNA?' PW9 had answered, like so: 'DNA profile is unique to every one where there is no person has the same DNA as the other person. No one can have the same DNA profile' (see p 350 record of appeal, Vol 2(2)). In other words, it is one of a kind. In Latin, it is termed as *sui generis.*

[50] In light of the nature of the injuries sustained by the deceased, which were all defensive injuries, we did not consider the evidence would justify a reduction of the murder charge to that of culpable homicide not amounting to murder. In her evidence, PW8, the pathologist was asked by the learned DPP the following question:

> Q: Based on all the injuries suffered by the deceased particularly the injuries no. 6, 7 & 8, what are the chances of survival of the deceased?
>
> A: It is my opinion as a result of injuries no. 6, 7 & 8, that the deceased suffered head injury I would say the chance of survival is slim. (See, p 301 Record of Appeal, Vol 2(2)).

[51] In the context of the Federal Court postulation in the *Tham Kai Yau* case, that would translate as an injury that would most probably caused death. That makes it murder, as oppose to culpable homicide not amounting to murder.

CONCLUSION

[52] In the upshot, premised upon the above considerations, we had dismissed both appeals. We found no appealable errors having been committed by the learned trial judge that would otherwise have vitiated his conviction and sentence against each of the accused persons of the proffered charge for murder under s 302 of the Penal Code read together with s 34 of the same Code. We

had therefore affirmed the conviction against the first accused person and the conviction against the second accused person. He was correct when he ruled and decided that the prosecution had established its case against both the accused persons beyond reasonable doubt and that both of the accused persons had not created any reasonable doubt in the prosecution case, neither as to their respective guilt. We had also affirmed the death sentence by hanging imposed by the learned trial judge on the first accused as well as on the second accused person.

[53] We had so ordered.

Appeal dismissed.

Reported by Izzat Fauzan